91-814

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHAMP CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, LOCAL 509,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May an employer be held responsible under the National Labor Relations Act for any employee backpay obligation which accrues while the case is pending on review before the National Labor Relations Board for an unconscionable length of time in violation of the Administrative Procedures Act?

2. May a federal court determine, consistent with national labor policy, that an economic strike was converted into an unfair labor practice strike absent any evidence that the strike was prolonged by the alleged unfair labor practices?

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit, as amended, is reported at 933 F.2d 688, and is reprinted in the Appendix hereto at Volume I, p. 1.[1] The prior superseded opinion of the Court of Appeals for the Ninth Circuit is reported at 913 F.2d 639, and is reprinted in the Appendix hereto at Volume I, p. 54.

The Decision and Order of the National Labor Relations Board is reported at 291 NLRB No. 119, and is reprinted in the Appendix hereto at Volume I, p. 103. The Decision of Administrative Law Judge Joan Wieder is printed as part of the Decision and Order of the National Labor Relations Board reported at 291 NLRB No. 119 and is reprinted in the Appendix hereto at Volume II, p. 1.

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[1] Champ Corporation has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

JURISDICTION

The original judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 29, 1990. Thereafter, Petitioner filed a timely Petition for Rehearing. The Court of Appeal denied said Petition and filed an amended judgment on May 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of Sections 8 and 10 of the National Labor Relations Act (29 U.S.C. § § 158 and 160) and Sections 551 and 555 of the Administrative Procedure Act (5 U.S.C. § 551 and 555) are set forth in the Appendix at pp. 640-656.

STATEMENT OF THE CASE

The instant case arises from an Application for Enforcement of an Order of the National Labor Relations Board

(hereinafter "the Board"). The jurisdiction of the Court of Appeals was invoked under § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e).

In December, 1978, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter "the Union") was certified as the exclusive collective bargaining representative for certain employees of Petitioner Champ Corporation (hereinafter "Champ"). After several months of collective bargaining, the parties reached an impasse and the Union commenced an economic strike against Champ.

During the course of the strike, the Union filed several unfair labor practice charges against Champ. The strike was eventually terminated by the Union in April 1980 after it became evident that, in the words of the Union's chief negotiator "the strike [and] the picket lines were not

really effective". During the collective bargaining sessions, the union never made any of Champ's alleged unfair labor practices the subject of negotiation.

In early 1980, Region 21 of the National Labor Relations Board issued a Complaint and Notice of Hearing which alleged that Champ had engaged in several unfair labor practices within the meaning of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. Champ denied it had committed any unfair labor practices and the matter was set for hearing.

Twenty days of hearing took place between December 1, 1980 and April 2, 1981 at the offices of Region 21. On February 4, 1982, Administrative Law Judge Joan Wieder issued her decision and recommended Order which concluded that Champ had committed numerous unfair labor practices. In addition, Judge Wieder determined that the

economic strike was converted into an unfair labor practice strike by certain of the alleged unfair practices. Accordingly, Judge Wieder proposed that Champ be required to collectively bargain with the Union and, based on her finding of the conversion of the strike, that Champ offer reinstatement to the striking employees and compensate them for any back pay which they lost from the date of the alleged conversion of the strike to the date of her order.

Following the issuance of Judge Wieder's Decision and Recommended Order, Champ filed exceptions thereto as did the General Counsel and the Union. All such exceptions were filed in early 1982. The issues raised were thereby presented to the Board for determination. On November 25, 1988, over six and one-half years after submission of the parties' exceptions, the Board issued its Decision and Order which affirmed the vast majority of the

Administrative Law Judge's Decision and Proposed Order, including her recommendations that Champ pay back wages to numerous employees from certain dates in 1980 "to present".

The Board filed an application for Enforcement with the United States Court of Appeals for the Ninth Circuit on or about April 7, 1989. As stated above, the Court of Appeals eventually issued its amended decision, granting enforcement of the Board's Order, on May 20, 1991.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision to enforce the National Labor Relations Board's Order which requires Champ to compensate numerous striking employees for back pay lost since 1980 completely ignores the fact that virtually 75 percent of any such economic loss flows directly from the Board's inexcusable neglect in processing its review of the instant case. As stated

above, the parties submitted their exceptions to the Administrative Law Judge's Decision and Proposed Order in March of 1982. It was not until late November, 1988, over six and one-half years after the submission of the exceptions by the parties, that the Board issued its Decision. No reason whatsoever has ever been given by the Board for its inordinate delay, nor did it give any consideration to the consequences of said delay.

In its brief to the Ninth Circuit, Champ expressed concern that, due to the fact that almost a decade had passed since the commencement of the strike giving rise to this action, the consequences of enforcing the Board's Order would most likely prove economically fatal to the Company. While such a fact may usually be irrelevant for the purposes of deciding whether to enforce an Order of the Board, the instant situation is not "usual".

Rather, the Board's unexplained and inexcusable procrastination in its review of this case is exclusively responsible for the vast majority of any economic losses (which have been estimated to potentially be as much as $10,000,000.00) suffered by the striking employees. To ignore this fact and blindly hold Champ responsible for all of such consequences flies in the face of both justice and equity. This is not the only recent case in which the Board's inordinate delay has been raised as an issue in deciding whether to enforce an order of the Board. See, N.L.R.B. v. Country Food Store, Inc., 931 F.2d 21 (8th Cir. 1991)(7 year delay by Board; enforcement denied); Texas Petrochemicals Corp. v. N.L.R.B., 923 F.2d 398 (5th Cir. 1991) (4 1/2 year delay by Board; order modified and remanded); N.L.R.B. v. Brookshire Grocery Company, 919 F.2d 359, 365 n. 6, (5th Cir. 1990); Emhart Industries, Hartford Division v. N.L.R.B.,

907 F.2d 372 (2d Cir. 1990) (3 1/2 year delay by Board; enforcement denied). In these cases, it has been recognized that the federal courts have been charged by congress with "responsibility for the reasonableness and fairness of Labor Board decisions." Emhart Industries, supra, 907 F.2d at 379, quoting Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490, 71 S.Ct. at 466. (1951)

In addition, it has been acknowledged that the Board is bound by the requirements of the Administrative Procedure Act, 5 U.S.C. § 500 et seq. and that one of the seminal requirements of said Act is that an agency endeavor to "conclude a matter presented to it" within a "reasonable time." 5 U.S.C. § 555(b). Texas Petrochemical, supra, 923 F.2d. at 404.

In the instant case, the Board's delay of over six and one-half years is a clear and gross violation of its obligations under the Administrative Procedures Act.

Consequently, the Ninth Circuit's decision, which ignores the dilatory conduct of the Board, constitutes an abdication of its responsibility to ensure the reasonableness and fairness of the Board's decisions. Accordingly, this Court should grant a writ to remedy the Ninth Circuit's error.

Beyond the issue of the Board's delay, the Ninth Circuit's decision is also fatally flawed in that it redefines established principles concerning the conversion of economic work stoppages into unfair labor practice strikes. In its initial decision, issued August 29, 1990 (Appendix p. 54), the Court appeared to create a new standard for deciding whether an economic strike had been converted into an unfair labor practice strike. Because of the multiplicity of questions created by this portion of the court's original opinion, Champ requested rehearing on the issue of conversion. The court ultimately denied Champ's petition but

also, at the same time, amended it's decision to clarify the standard for conversion that it was adopting. (Appendix p. 1.)

Prior to the Court of Appeals' decision in this case, the standard for a finding of conversion of a strike was well established. "An employer's unfair labor practice will convert an economic strike into an unfair labor practice strike only where there is substantial evidence that the unfair labor practice prolonged the strike." N.L.R.B v. Burkart Foam, Inc., 848 F.2d 825 (7th Cir. 1988) (emphasis added). In Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1079-80 (1st Cir. 1981), a case bearing strong similarity to the instant matter, the court held that before a Board order finding conversion of a strike can be enforced"

. . .[i]t must not only be shown that the employer committed an unfair labor practice after the commencement of the strike, but

that as a result, the strike was 'expanded to include a protest over (the) unfair labor practice' and that the settlement of the strike was thereby prolonged." Id. at 1079-80, quoting N.L.R.B. v. Top Mfg. Co., 594 F.2d 223, 225, (9th Cir. 1979) and N.L.R.B. v. Moore Business Forms, 574 F.2d 835, 840 (5th Cir. 1978) (emphasis added). The Soule court noted that the employees therein had been made aware of the employer's unfair labor practices and decided not to return to work until they were rectified. However, the court also noted that there were numerous other points of contention between the parties. In light of these facts, the court concluded that "[t]he most that could be inferred from [the employees' response to the employer's unfair labor practice], standing alone, is that the wage increase may have 'aggravated (the company's) differences with the Union' on the crucial wage issue', Kohler Co., 128 N.L.R.B. 1062,

1083-84 (1960), and thereby caused the union to hold out for a higher offer or to persist with higher demands than it otherwise would have. In context and without some further corroboration in the record, however, the latter inference is an unduly tenuous and speculative basis on which to hinge the board's determination of the fundamental nature of the strike and the harsh remedial consequences that flow from such a determination. Id. at 1081 (emphasis added). Thus, it is not sufficient that the striking employees were aware of the alleged unfair labor practices; the standard previously accepted by the courts was that the record must also supply the court with evidence that the strike was actually prolonged by such acts.

While the Court of Appeals herein stated its intention to adopt the conversion standard accepted by other courts of appeals, it thereafter ignored the fact

that, under that standard, there cannot be a finding of conversion in the absence of substantial evidence in the record that any of the alleged unfair labor practices in any way prolonged the strike. Rather, the record evidence establishes only that issues which separated the parties throughout negotiations remained the stumbling blocks to achieving a collective bargaining agreement and the Union's chief negotiator testified that the strike was ultimately terminated because it became "increasingly evident that the strike [and] the picket lines were not really effective." At that time, the Union submitted unconditional offers of reinstatement for all striking employees. Accordingly, it is clear that any alleged unfair labor practices were not at issue at that time.

In spite of the fact that the evidence conclusively precludes a finding of conversion of the strike, the Court of

Appeals enforced the Board's Order. In order to do so, it focused not on the impact the unfair labor practices had on the strike, but rather, on the Union's ostensible reaction to the alleged illegal acts. In so doing, the Court ignored the basic proposition that the simple commission of an unfair labor practice during the course of a strike does not automatically convert it into an unfair labor practice strike. N.L.R.B. v. Jarm Enterprises, Inc., 785 F.2d 195, 204 (7th Cir. 1986).

It can be unequivocally stated that a union will always be opposed to an employer's alleged unfair labor practice. It is for this reason that the focus of inquiry must be on the impact of the alleged unfair labor practices on the strike. This is particularly true due to the extreme consequences (i.e., reinstatement and backpay) which flow directly from a determination that the strike was converted.

It is axiomatic that if the strike is unaffected by the unfair labor practice, it cannot have been converted by it. In the instant case, the record evidence is conclusive: Champ's alleged unfair labor practices in no way prolonged the strike, which ran its normal course and was affected only by legitimate issues of collective bargaining and the economic impact of replacement employees. This being the case, the court violated established principles of federal labor law in ruling that the economic work stoppage was converted into an unfair labor practice strike by Champ's alleged practices and in so doing dramatically altered the delicate balance between the interests of labor and management which has existed since the passage of the National Labor Relations Act in 1935.

The implications of the Court of Appeals' decision on national labor policy

are monumental. If this decision is allowed to stand, employers will now be faced with a greatly increased potential for a finding of conversion of a strike, as well as the threat of actual extinction due to the economic consequences of the Board's inordinate delay. Given this situation, employers will be compelled to capitulate in negotiations rather than accept a strike and assume such risks. It is, therefore, indisputable that the court's decision serves to tip the scales in favor of labor and thereby upsets the balance between labor and management which Congress and the courts have striven to achieve for over 50 years.

In light of the Ninth Circuit's unwarranted reinterpretation of the traditional conversion standard, and its refusal to enforce the explicit requirements of the Administrative Procedures Act, it is submitted that this Court, in the exercise

of its supervisory powers over the federal judiciary, should settle these important questions of law.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ for Certiorari should be granted.

DATED: August 16, 1991

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